IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No.: ***190 of 2000***

Date of decision : 19.11.2009

Ram Kumar and others. …Appellants.

Versus

Sharda Devi and others …Respondents

Coram

The Hon'ble Mr. Justice Deepak Gupta, Judge.

Whether approved for reporting?[1] *No.*

For the Appellants:	Mr. N.K.Thakur, Advocate.
For the Respondents No.1:	Mr. S.S.Mittal Sr. Advocate with Shri Surinder P. Sharma, Advocate.
For the Respondents No.2 to 4:	Mr. Ramesh Sharma vice Mr. Jagdish Thakur, Advocate.

Deepak Gupta, J. (*Oral*).

This appeal is directed against the judgement and decree of the learned District Judge, Una, passed in Civil Appeal No. 36 of 1993 whereby he upheld the findings given by the learned Sub Judge, 1st Class, Court No.II, Amb, in Civil Suit No. 47 of 1991 decided on 16.1.1993 but held that the plaintiff was not entitled to get the possession of the suit land.

Briefly stated, the facts of the case are that the plaintiff claimed that he is the owner of the land measuring 412-40 sq. mtrs. comprised in Khasra No.3534 old corresponding to Khasra No.762 new situated in Up-mahal Indra Nagar, Mohal Kaloh, Tehsil Amb, District Una, H.P. and also prayed for decree of permanent

[1] ***Whether the reporters of the local papers may be allowed to see the Judgment? Yes.***

injunction restraining the defendant No.1 from interfering in the ownership and possession of the plaintiff and proforma defendants No. 2 to 6. It was prayed in the alternative that if in the meantime the defendant manages to obtain possession of the suit land then a decree for possession be granted in favour of the plaintiff.

The defendant contested the suit on various grounds but her basic plea was that she was in adverse possession over the suit land and her adverse possession has matured into ownership. Both the Courts below have held that it is the plaintiff who is the owner of the land. Both the Courts below have also held that defendant Sharda Devi has not proved the plea of adverse possession and she is a trespasser over the suit land. The learned trial Court passed a decree for possession in favour of the plaintiff but the lower appellate Court held that such a decree could not be granted because the defendant Sharda Devi had raised construction of a house on a portion of the suit land prior to the institution of the suit and there was no prayer in the suit for the demolition of the structure.

Aggrieved by this portion of the decree the present appeal filed by the plaintiff and has been admitted on the following substantial questions of law:-

1. Whether the lower appellate Court has wrongly declined the decree for possession simply on the ground that specific prayer for demolition/removal of structure was not made in the plaint. Has not lower appellate Court failed to take into consideration the provisions of Order 7 Rule 7 and Order 41 Rule 33 CPC?
2. Whether the lower appellate Court has wrongly set-aside the decree of trial Court, granting the relief of possession, when the title of the plaintiff-appellant was duly established and the claim of adverse possession set up by the defendant was negatived?

3. Whether the lower appellate Court has incorrectly drawn adverse inference against the plaintiff-appellant for non-examining the local Commissioner, are not such findings against the provisions of Order 26 of CPC.

Though three questions of law have been framed but basically the question is whether the lower appellate Court could have declined to grant a decree for possession only on the ground that the defendant had raised construction over a portion of the suit land prior to the filing of the suit. It would be pertinent to mention that the present suit was filed on 14.3.1991 and on 20th March, 1991 on the application of the plaintiff Shri J.R.Rattan, Advocate, was appointed as Local Commissioner to visit the spot and to ascertain the extent of construction raised at the spot. Shri Rattan, Advocate, visited the spot on 20th March, 1991 and submitted his report Ext.P-2 on 21st March, 1991. In this report it is stated that the defendant had raised construction comprising of three rooms 30x10 feet covered with walls of Pucca bricks and one door towards southern side was affixed. According to him the construction was new and lintel had been placed two-three days earlier since the water was still seeping down. This report though exhibited has not been proved by examining the Local Commissioner. However, even if this report is taken into consideration all that this report shows is that the lintel in question was laid two-three days earlier. As far as the other construction is concerned the report is silent and the learned lower Appellate Court was right in holding that there is nothing to disbelieve the statement of PW-2 who had stated that the house had been constructed some time in January/February, 1991. Even if the

entire construction had not been completed it is apparent that the a substantial portion of the structure had already been raised before filing of the suit. The plaintiff despite knowing that a structure had been raised did not pray for demolition of such structure. There was no stay order till the time when the lintel was laid. Even after the Local Commissioner filed his report the plaintiff did not move an application for amending the plaint praying that a decree for demolition of the construction may also be passed. No such prayer was made. Therefore, to this extent the learned lower Appellate Court was right that though the plaintiff may have prayed for a decree for possession but the structure could not be demolished on the basis of this decree without any prayer having been made in this behalf. However, in my opinion the learned lower Appellate Court has gone wrong in setting aside the entire decree of possession. The decree for possession related to 438 sq.mtrs. of land. At best what could have been refused to the plaintiff was the possession of the structure. The plaintiff having been found to be owner of the land could not have been denied the possession of the land on which no construction has been raised.

In view of the above discussion, substantial questions of law are partly answered in favour of appellant-plaintiff. The decree of the learned lower Appellate Court is modified and it is held that plaintiff is entitled to possession of the vacant land comprised in Khasra No.3534 old corresponding to Khasra No.762 new situated in Up-mahal Indra Nagar, Mahal Kaloh, Tehsil Amb, District Una, H.P. but shall not be entitled to a decree for demolition or possession of the structure already raised prior to the filing of the

suit. However, the defendant cannot be denied his right of ingress and egress to the constructed portion and to this extent the Executing Court shall while handing over possession ensure that if no other passage is available a passage three feet wide is made available to the defendant from the property in question.

The appeal is disposed of in the aforesaid terms. No order as to costs.

19th November, 2009 **(Deepak Gupta)**
™ ***Judge.***